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NO._____

IN THE
UNITED STATES SUPREME COURT

October 1987 TERM

DANIEL E. MAYON, PLAINTIFF, APPELLEE, PETITIONER

V.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, DEFENDANT, APPELLANT, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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APPELLEE, PETITIONER

V.

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QUESTIONS PRESENTED

Whether the Fifth Circuit disregarded the facts and misinterpreted the law in reversing the District Court's setting aside of Award No. 47 of Public Law Board No. 3604.

Whether the Public Law Board exceeded its jurisdiction in arbitrarily and capriciously basing its award outside the collective bargaining agreement.

Whether it contravenes public policy for a Public Law Board to consider the amount of a prior FELA verdict in arbitrating a subsequent wrongful discharge claim.

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REPORTS OF DECISIONS BELOW

The decisions of the District Court and the Fifth Circuit in this case are unpublished. The Fifth Circuit opinion is fully set out in the Appendix.

JURISDICTIONAL STATEMENT

The Fifth Ciruit rendered its judgment on September 2, 1987. No motions for rehearing or motions for extension of time have been filed.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) and the Railway Labor Act, 45 U.S.C. § 153(q).

STATUTES INVOLVED

The provisions of the Railway Labor Act relevant to this appeal are fully set out in the Appendix.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

On September 2, 1983 Petitioner Daniel E. Mayon's suit against Respondent, Southern Pacific Transportation Co. was tried to a jury verdict in favor of Mayon in the amount of $200,000. Daniel E. Mayon v. Southern Pacific Transportation Co., No. B-82-317-CA, United States District Court, Eastern District of Texas - Beaumont Division (1983). Judgment was entered, and Southern Pacific paid Mayon on October 7, 1983. No remittitur was sought; no motion for new trial was filed; and no appeal was perfected. Instead, within two hours of paying the judgment, Southern Pacific notified Mayon that he would not be allowed to

return to work. Mayon proceeded before the Railway Labor Board for reinstatement and back wages. The Public Law Board awarded him reinstatement but less than full back pay. Suit was filed in Daniel E. Mayon v. Southern Pacific Transportation Co., No. B-85-946-CA, United States District Court, Eastern District of Texas - Beaumont Division to set aside that portion of the award granting less than full back pay. The district court set aside the portion of the award which had denied Mayon full recovery and ordered Southern Pacific to pay full back pay. The court of appeals reversed. Southern Pacific Transportation Co. v. Daniel E. Mayon, No. 86-2715, United States Court of Appeals for the Fifth Circuit (Sept.

2, 1987) (unpublished).

STATEMENT OF FACTS

Daniel E. Mayon, an engineer employed by Southern Pacific, injured his back while on the job and filed a lawsuit under the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq. (1971) ("FELA"). Daniel E. Mayon v. Southern Pacific Transportation Co., No. B-82-317-CA, United States District Court, Eastern District of Texas - Beaumont Division. His primary complaint was that his back hurt. He claimed no inability to perform his job, and no such evidence was admitted at trial. At the time his case went to trial, he had been working for over a year on a regular basis. The jury awarded Mayon a verdict in the amount of

$200,000. On October 7, 1983, Mayon's counsel received a telephone call from the Carrier requesting a copy of the deposition of Dr. Ronald L. Fraser. Mr. Mayon's attorney immediately delivered a copy of the deposition requested to Southern Pacific's counsel. On the same day, the settlement papers were signed and delivered to and the Carrier paid the $200,000 judgment. Two hours later, a non-medical officer of Southern Pacific notified Mayon that his employment was terminated for medical reasons. A confirmation letter followed.

Southern Pacific allegedly based its termination of Daniel Mayon on the medical opinion of Dr. Hyder, a medical officer of the company. Dr.

Hyder stated that he based his opinion on the deposition testimony of Dr. Fraser, who served as an expert witness for Daniel Mayon. However, Dr. Hyder admitted that he did not receive a copy of Dr. Fraser's deposition until December 2, 1983 - two months after Mayon was discharged. R. 19. Consequently, the reason given by the Railroad for disqualifying Daniel E. Mayon could not possibly have been valid. Further, the testimony and subsequent letters of the only two doctors directly involved in Mayon's treatment unequivocally stated that Mr. Mayon was medically able to perform his regular duties as a railroad engineer R. 20-21.

Mayon filed for reinstatement

pursuant to the Railway Labor Act, 45 U.S.C. § 153 , First. Public Law Board No. 3607 found that Mayon had continued to work after the injury and until the date of his discharge. R. 27. The Board found "no compelling or even persuasive probative evidence" that proved Mayon could not have continued to work as an engineer after October 7, 1983, the date of his discharge. R. 28.

The neutral doctor, from a three doctor panel, found nothing which would have kept Mayon from his full duties as engineer after October, 1983. R. 26. The Board considered the neutral doctor's statement "persuasive if not dispositive" on the issue of Mayon's medical condition. R. 28.

The Board ordered the Carrier to reinstate Daniel Mayon to his duties as engineer. The award, however, denied him full recovery of back wages lost because of his wrongful discharge. R. 22-24.

In denying full recovery, the Board inferred a future lost earnings component into the damage verdict and money judgment granted in the FELA action. However, there was no evidence before the Board on which it could conclude that any portion of the prior jury award was calculated to compensate Mayon for future lost wages. The Board listed the elements of damage pleaded by Mayon in the FELA suit and noted the absence of a claim for permanent disability. R. 22-23, 49.

Mayon, pursuant to 45 U.S.C. § 153, First (q), filed a petition to set aside the Public Law Board award. R. 1. Mayon also filed a supplemental brief in support of his petition. R. 47. The Court considered Mayon's arguments to be meritorious and ordered his back pay of thirteen months reinstated in full. R. 53. Southern Pacific appealed, and the Fifth Circuit reversed.

SUMMARY OF THE ARGUMENT

An aggrieved employee is entitled to judicial review of a Public Law Board decision when an order fails to confine itself to matters within the Board's jurisdiction. 45 U.S.C. § 153, First (q). Accordingly, the district court was entitled to review and set aside the Public Law Board

order which denied Mayon's full recovery of back wages lost due to his wrongful discharge.

The Board failed to confine itself to matters within its jurisdiction because it considered the thought processes of jurors in awarding damages in an FELA suit; it considered the FELA suit itself; and it reached a conclusion that was entirely irrational and without any basis in fact which conflicted with its own findings. Additionally, public policy dictates that the Board not be allowed to consider FELA suits in determining an award for lost wages as a result of wrongful discharge.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit erred in reversing the district court's judgment setting aside that portion of Award No. 47 of Public Law Board No. 3607 which denied Daniel E. Mayon full back pay by misinterpreting the facts.

On page 6 of its opinion, the court of appeals states that it would be improper for Daniel E. Mayon to sue his employer claiming total and permanent disability and then force Southern Pacific to reinstate him with full back pay.

A. 12. However, Daniel Mayon never claimed he was totally or permanently disabled. In fact, he claimed the opposite. R. 23. He went back to work shortly after his back injury

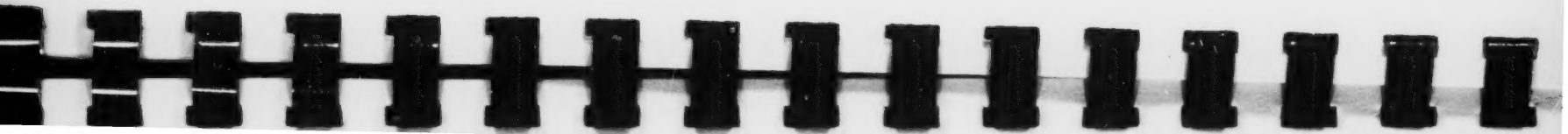
and continued to work until Southern Pacific discharged him two hours after it paid the FELA judgment. R. 27-28.

The entire court of appeals opinion is premised on the mistaken assumption that Mayon was attempting to secure a double recovery for his back injury. This simply is not the case.

Southern Pacific discharged Daniel Mayon under highly suspicious circumstances. The Carrier terminated him only two hours after it paid the FELA judgment. R. 25. A non-medical officer of Southern Pacific told Mayon he was discharged because he was medically disqualified from performing his job as an engineer. R. 7, 25. The Carrier claimed its

decision was based on a deposition which its own doctor did not receive until 60 days after Mayon was disqualified. R. 19.

Because he only lost 17 days of work due to his back and had continued to work throughout the trial, the Carrier's malicious conduct in terminating his employment was totally unforseeable. See, e.g., DeChico v. Metro-North Commuter RR, 758 F.2d 856, 861 (2d Cir. 1985)(that employee might be forced to leave his job was too speculative to support a damage award). Only foreseeable damages are recoverable in a negligence suit. Zippertubing Co. v. Teleflex, Inc., 575 F.2d 1401 (3d Cir. 1985). Moreover, an FELA claimant cannot recover for future



lost wages or future impairment of earning capacity when he has returned to work and is physically able to continue indefinitely in the same job. DeChico, 758 F.2d at 861. Therefore, no part of the jury verdict in the FELA suit could represent damages for future wages lost due to a wrongful discharge. Daniel Mayon does not seek further damages because of his injured back. He seeks only the backpay to which he is rightfully entitled as a result of his wrongful discharge.

II. The Public Law Board exceeded its jurisdiction in denying Daniel Mayon full back pay by basing its award on matters outside the

collective bargaining agreement and by making the award arbitrarily and capriciously.

This case mandates review because the Public Law Board failed to confine itself to matters within the scope of its jurisdiction. The powers of an arbitrator are not limitless. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Keystone Consolidated Indus., Inc., 782 F.2d 1400, 1403 (7th Cir. 1986).

The Railway Labor Act specifically provides for judicial review of an award when the Board fails to confine itself to matters within its jurisdiction. 45 U.S.C. § 153, First (q). An award exceeds the jurisdiction of an arbitrating body

when the award is wholly baseless and without reason, arbitrary, capricious, unfounded in reason or fact, or when it is based on matters outside the collective bargaining agreement. Gunther v. San Diego & Arizona Eastern Ry Co., 382 U.S. 257 (1965)(wholly baseless and without reason); Teamsters, Chauffers, Warehousemen, Helpers & Food Processors, Local Union 657 v. Stanley Structures, Inc., 735 F.2d 903 (5th Cir. 1984)(arbitrary and capricious); Brotherhood of RR Trainmen v. Central of Georgia Ry Co., 415 F.2d 403 (5th Cir. 1969)(without foundation in reason or fact); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)(outside collective

bargaining agreement). Public Law Board No. 3607 violated the Railway Labor Act in each of these respects by wrongfully refusing to award Daniel Mayon full back pay.

The Board stated it was not at liberty to disregard that a component of the FELA verdict pertained to lost wages. R. 28. However, this contradicts its own fact finding that the jury verdict was not based on permanent or total disability. R. 23.

Even if a part of the jury verdict represented future lost wages, it could not be used to diminish Mayon's recovery for wrongful discharge. The Board found that Southern Pacific had wrongfully disqualified Mayon from service because the neutral doctor found him

medically fit to perform his job. R. 28. If any part of the jury award represented future lost wages, it would be based on evidence that Mayon would be physically unable to perform his job in the future. The Board found the opposite. Further, no portion of the FELA verdict could possibly be designed to compensate Mayon for wages lost due to wrongful discharge because those damages are not recoverable under the FELA. 45 U.S.C. 51 et seq.; see also e.g., Andrews v. Louisville & Nashville RR, 406 U.S. 320 (1972); Landfried v. Terminal RR Ass'n of St. Louis, 721 F.2d 254 (8th Cir.), cert. denied, 104 S.Ct. 1712 (1984).

More importantly, the thought processes of jurors and the inter-

pretation of an FELA award are beyond the jurisdiction of an arbitrator. The members of the Public Law Boards have superior knowledge of the customs and practices of the railroad industry. Slocum v. Delaware L.&W. R. Co., 339 U.S. 239, 243-44 (1950). Board members are experts in the laws of the shop not the laws of the land. The Board is not competent to interpret the FELA. The Board is only competent to interpret the provisions of collective bargaining agreements. The Board's utilization of Mayon's FELA verdict is the same as if it had reduced his back pay award by the amount of a gift from a wealthy relative to tide the employee over while he was wrongfully withheld from work. The FELA suit did not

relate in any way to the retaliatory discharge action before the Board.

There is absolutely no evidence in the record indicating that the collective bargaining agreement between Daniel Mayon's union and Southern Pacific authorized the Public Law Board to reduce his back pay award due to his FELA verdict. The agreement required evidence submitted to the Board be confined to the record previously submitted by each party. The jury deliberations in the FELA action were not a part of that record. Where the Board's award shows manifest disregard of the collective bargaining agreement, the district court must vacate the award. Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l

Union, 548 F.2d 1288, 1294 (7th Cir. 1977)(citing Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969)).

The Board, by reaching outside the collective bargaining agreement and into the realm of pure speculation, concluded that a future lost earnings component was present in the FELA verdict. This represents an unwarranted attempt to "dispense its own brand of industrial justice." Such actions were prohibited by this Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

Mayon was able to work. The Board found no probative evidence that he could not have continued to

work after his discharge. R. 28. He claimed no incapacity. While the arbitrator has some discretion in formulating remedies, "it is clear that he is not utterly a free agent even in that respect." Brotherhood of Trainmen v. Central of Georgia Ry Co., 415 F.2d 403 (5th Cir. 1969).

The Board speculated as to the jurors' mental processes in Mayon's FELA case and, based on this speculation, inferred that the verdict included an award for future lost wages. In so doing, the Board exceeded its authority granted under the collective bargaining agreemnet and subjected itself to judicial review. The Board overstepped its jurisdiction by considering facts not before it and by taking upon itself

the duty of interpreting the jurors' motives.

III. For a Public Law Board to consider a prior FELA judgment in ruling on a wrongful discharge claim contravenes public policy.

To allow an arbitrator to consider FELA settlements, verdicts, and judgments in fashioning an award for back pay as a result of retaliatory discharge creates a patently unfair situation for any FELA claimant. It invites the Carrier to collaterally attack the damages awarded in any FELA suit by wrongfully discharging the employee. In essence, if the wrongfully terminated employee is reinstated with less than full pay, he will receive less than what the jury had

intended. The result is significant interference with the Federal Employers' Liability Act by an arbitrator, and an open invitation to retaliate and deter future legitimate claims should the jury's decision not conform to what the Carrier expected.

The FELA and the Railway Labor Act serve completely different purposes and protect completely separate interests. The FELA was enacted to protect railroad employees who are physically injured through the negligence of their employer and thus compel the railroads to better safeguard the lives of those who work for them. 45 U.S.C. § 51; Wilkerson v. McCarthy, 336 U.S. 53, 68 (1969) (Douglas, J., concurring)("the Federal Employers' Liability Act was

designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."). Conversely, the Railway Labor Act was enacted to regulate the railroad industry by providing for the resolution of disputes arising out of the interpretation of collective bargaining agreements concerning wage rates, rules, and working conditions. 45 U.S.C. § 153, First(i); Pennsylvania RR Co. v. Day, 360 U.S. 548, 551 (1959). Because the two acts remedy vastly different problems, common sense dictates that an arbitrator fashioning a remedy for wrongful discharge under the Railway Labor Act should not be allowed to reduce the award by any amount of an

FELA judgment which was rendered to compensate the employee for personal injuries. To allow such a mixing of apples and oranges emasculates both acts by allowing the railroads to circumvent one act through use of the other as happened to Daniel E. Mayon.

Mayon was injured on the job through Southern Pacific's negligence. He pursued his rights under the FELA and obtained a favorable verdict. Rather than challenge that verdict in the courts, the Railroad chose to collaterally attack the personal injury judgment by discharging Mayon thus throwing the whole dispute under the Railway Labor Act. By inducing the Public Law Board to reduce Mayon's back pay award by a speculative amount based on the

personal injury verdict, the Carrier effectively reduced his FELA recovery by approximately $20,000, the amount of back wages the Board denied. Neither the purpose of the FELA nor that of the Railway Labor Act are served by such a scenario. If this Court allows the Board award to stand, then it will invite similar and more egregious conduct by the railroads which will add insult and monetary injury to the already serious physical injuries frequently suffered by railroad employees.

CONCLUSION

To reach its result denying Daniel Mayon full back pay, Public Law Board No. 3607 had to reach beyond the collective bargaining

agreement and the record before it into the speculative realm of the minds of jurors in a completely unrelated lawsuit. This exceeded the Board's jurisdiction.

Further, for the Board to consider a prior FELA verdict in fashioning a Railway Labor Act award contravenes public policy and risks emasculating both statutes by allowing the railroads to circumvent one act by invoking the other. Such conduct should not be tolerated by this Court.

WHEREFORE PREMISES CONSIDERED, Petitioner, Daniel E. Mayon respectfully prays that this Court grant Writ of Certiorari and reverse the decision of the Fifth Circuit Court of Appeals and affirm the

decision of the United States District Court for the Eastern District of Texas - Beaumont Division setting aside that portion of Award No. 47 of Public Law Board No. 3607 denying Daniel E. Mayon recovery of full back pay, and for such further relief to which Petitioner shows himself justly entitled.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on all attorneys of record by certified mail return receipt requested or by hand delivery on this 30th day of November, 1987.

RUSSELL L. COOK, JR.

APPENDIX

IN THE UNITED STATES COURT OF

APPEALS FOR THE FIFTH CIRCUIT

No. 86-2715

DANIEL E. MAYON,

Plaintiff-Appellee,

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendant-Appellant.

Appeal from the United States District Court For the Eastern District of Texas (B-85-946-CA)

(September 2, 1987)

Before RANDALL, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the

public and burden on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The question presented in this case is whether the district court erred in setting aside the award of an arbitration board. Because of the deference due the board's decision, we conclude that the district court committed error in setting aside its award. Accordingly, we reverse and reinstate the award of the board.

I.

Daniel E. Mayon is employed by appellant, Southern Pacific Transportation Company (SP), as a locomotive engineer. In May 1981, Mayon injured his back throwing a switch and instituted a damage action against SP under the Federal Employer's Liability Act (FELA). Mayon claimed damages for pain and suffering, loss of past and future wages, and other general tort

damages. In September 1983, the jury returned a general verdict in favor of Mayon for $200,000. At the time of trial, Mayon had missed only seventeen days' work because of his injuries. On October 7, 1983, SP paid the judgment and on that same day discharged Mayon on grounds that he was medically disqualified from performing his duties as an engineer. This decision was predicated on deposition testimony of one of Mayon's expert medical witnesses.

Mayon sued SP in federal district court for wrongful discharge but that suit was dismissed on grounds that Mayon's sole remedy was under the Railway Labor Act, 45 U.S.C. § 151, et seq. Mayon v. Southern Pacific Transportation Co., 632 F.Supp. 944

(E.D. Tex.), aff'd, 805 F.2d 1250 (5th Cir. 1986). Mayon then proceeded to arbitration before the Public Law Board (the Board) for reinstatement and back wages as required by the Railway Labor Act, 45 U.S.C. § 153. The Board found that Mayon should be reinstated, but although thirteen months had elapsed since Mayon's discharge, the Board awarded him only six months' back pay. The Board reasoned that: ". . . In determining the amount [of back pay] we are not at liberty to disregard that a component of the $200,000 judgment that the claimant received pertained to lost earnings . . . We find that a reasonable and fair disposition of the lost earnings issue is to take cognizance, in some part, of the money judgment received

by the claimant." Mayon then filed this suit to set aside that part of the Board's award limiting him to six months' back pay. The district court, without explanation, ordered back pay for the full thirteen-month term of Mayon's discharge. SP brings this appeal.

II.

The scope of judicial review over both legal and factual determinations made by a labor arbitration board vested with jurisdiction by the Railway Labor Act is exceedingly narrow.[1]

1. The Board's jurisdiction to resolve the dispute is not wrongful discharge claim, we held that Mayon's retaliatory discharge was within the exclusive jurisdiction of the Board: "Disputes under a collective bargaining agreement involving discharges are 'minor' disputes that must be submitted to grievance procedures ending in arbitration under the RLA". (citing cases). Mayon v. Southern Pacific Transportation Co., 805 F.2d 1250, 1251.

As we stated in Air Line Pilots Association, International v. Eastern Airlines, Inc., 632 F.2d 1321, 1323 (5th Cir. 1980):

> The range of judicial review in cases arising under the Railway Labor Act is "among the narrowest known to the law." . . . The findings and order of an Adjustment Board are final and conclusive and subject to very limited review. An order may be set aside or remanded on one of three grounds as set forth in 45 U.S.C. § 153(q): (i) failure of the [Board] to comply with the requirements of [the Act]; (ii) failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction; or (iii) fraud or corruption by a member of the [Board] making the order . . . "An award must be enforced, without judicial review of the evidence, if it draws its essence from the collective bargaining agreement."

No contention is made that the Board did not comply with the requirements of the Act or that a member of the Board was guilty of fraud or corruption in making the

order. Mayon's only argument is that because the Board acted irrationally and without factual basis in awarding him only six months' back pay, it exceeded its authority. Mayon argues in essence that because the jury did not declare whether any part of its FELA award was for lost future earnings, the Board had no factual basis for awarding him less than full back pay.

The collective bargaining agreement is not included in the record but the parties point to no provision in that agreement that compels an award of full back pay on reinstatement and we assume there is no such provision. Similarly, we assume that the collective bargaining agreement is silent on whether a back

pay award is to be reduced by an FELA damage award.

The appellee misapprehends the role of an arbiter. The Supreme Court spoke to this question in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 4 L.Ed.2d 1424, 1428 (1960):

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

See also Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403 (5th Cir.

(1969).

The Board is not limited to common law remedies. "As long as the award is essentially drawn from the agreement it is valid and effectively etched in stone. . . . A wide variety of situations may arise, many of which may never have been considered by the draftsmen of the collective bargaining agreement." Air Line Pilots, 632 F.2d 1321, 1324.

This case presents such a situation. The employer had just paid a $200,000 judgment to Mayon predicated in part on Mayon's medical evidence that the injury would hinder his future ability to perform his job as a locomotive engineer. Although the Board, after considering additional medical evidence, found

inadequate support for the discharge, the actions of the employer were not totally unjustified.

Under these circumstances, the Board fashioned the remedy it considered fair: reinstatement without full back pay. In reaching a fair resolution to this problem, the Board apparently shared the view of this court in Hodges v. Atlantic Coastline Railroad Co., 363 F.2d 534, 539 (5th Cir. 1966).

> [W]e feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming permanent and total disability, establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost.

The Board acted within its

authority. The district court was not authorized to second guess the arbiter. Accordingly, the judgment of the district court is reversed and the award of the Board is reinstated.

REVERSED.

RELEVANT PROVISIONS OF THE RAILWAY LABOR ACT

45 U.S.C. § 153, First (q)

If any employee of group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall

file in the court the record of the proceedings on which it based its action. The Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a

member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

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Supreme Court, U.S.
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V.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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OF COUNSEL:

Russell L. Cook, Jr. & Associates

NO._____

IN THE
UNITED STATES SUPREME COURT

October 1987 TERM

DANIEL E. MAYON,
PETITIONER

V.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
RESPONDENT

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OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DANIEL E. MAYON	*	
	*	
VS.	*	CIVIL
	*	ACTION
	*	NO.
	*	B-85-946
	*	CA
	*	
SOUTHERN PACIFIC	*	
TRANSPORTATION COMPANY	*	

ORDER

On this day came on to be heard Plaintiff's Petition to Set Aside Award of Public Law Board and Defendant's Brief in Opposition, and all the arguments having been considered by the Court, the Court find Plaintiff's arguments meritorious. It is therefore,

ORDERED, ADJUDGED AND DECREED that Plaintiff's Petition to Set Aside award of Public Law Board is hereby GRANTED as to that portion of the

award denying Plaintiff the full thirteen months' back pay; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff be awared thirteen months back pay.

SIGNED AND ENTERED this ____ day of August.

_____

UNITED STATES DISTRICT COURT

Respectfully submitted,

RUSSELL L. COOK, JR.
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1221 Lamar, Suite 1300
Houston, Texas 77010
(713) 650-1221

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served upon all attorneys of record by certified mail, return receipt requested or by hand delivery on this 12th day of August, 1988.

RUSSELL L. COOK, JR.

Supreme Court, U.S.
FILED
OCT 5 1988
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CLERK

No. 88-304

In The

Supreme Court of the United States

October Term, 1987

DANIEL E. MAYON,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit erred in refusing to allow the district court judge to substitute his opinion for that of the Arbitration Board.

LIST OF PARTIES

All parties to this case are correctly listed in the style.

The following is a list of Respondent's parent, subsidiary and affiliated companies:

Santa Fe Southern Pacific Corporation
Southern Pacific Company
Southern Pacific Transportation Company*
Evergreen Leasing Corporation
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
Pacific Fruit Express Company
Pacific Motor Transport Company
Pacific Motor Trucking Company
Southern Pacific Air Freight, Inc.
Southern Pacific Equipment Company
Southern Pacific International, Inc.
Southern Pacific Marine Transport, Inc.
Southern Pacific Warehouse Company
Visalia Electric Railroad Company
Dallas Terminal Ry. and Union Depot Co.
The Southwestern Town Lot Corp.
St. Louis Southwestern Ry. Co. 99.87%
The Alton & Southern Ry. Co. 50%
Arkansas & Memphis Railway Bridge
and Terminal Company 66.6%
Kansas City Terminal Railway Co. 8.3%
Southern Ill. and Mo. Bridge Co. 40%
Terminal R.R. Assoc. of St. Louis 14.3%
Trailer Train Company 2.4%
Central California Traction Company 33.3%
The Ogden Union Ry. & Depot Co. 50%
Portland Terminal R.R. Co. 20%
Portland Traction Company 50%
Sunset Railway Company 50%
Trailer Train Company 2.4%

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* Southern Pacific Transportation Company is wholly owned by Southern Pacific Company (stock held in independent voting trust with LaSalle National Bank), which is owned by the Santa Fe Southern Pacific Corporation.

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OPINIONS BELOW

The decisions of the District Court and the Fifth Circuit Court of Appeals are unpublished opinions. Both opinions have been reproduced in the petitioner's petition for certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1) and the Railway Labor Act, 45 U.S.C. § 153 First (q).

STATUTE INVOLVED

45 U.S.C. § 153 First is the only relevant statute involved and is reprinted in the Appendix at Page App. 1.

STATEMENT OF THE CASE

On October 7, 1983, Daniel Mayon, an employee of the Southern Pacific Transportation Company, was medically discharged as a locomotive engineer following a back injury, a subsequent FELA claim and a trial that resulted in his recovering $200,000 for damages that included future impairment after September 2, 1983, the date of the verdict.

The discharge was predicated on the Railroad's belief that, under the trial testimony of Mayon's treating

physician in the FELA case, Mayon was medically unable to perform his duties as a locomotive engineer. R. 6-7.

Thereafter, Mayon filed his petition for reinstatement pursuant to the administrative procedures established by the Railway Labor Act, 45 U.S.C. § 153 First.[1] The Public Law Board[2] ordered a three doctor panel to examine Mayon, following which, he was ordered reinstated on November 25, 1984, but with only six months back pay. R. 26, 28. The Board reasoned:

> "... in determining the amount [of back pay] we are not at liberty to disregard that a component of the $200,000 judgment that the Claimant received, pertained to lost earnings." R. 28.

* * *

---

1 Also thereafter, Mayon filed a suit against the Southern Pacific Transportation Company in the United States District Court for the Eastern District of Texas alleging that he was fired in retaliation for successfully prosecuting the FELA claim, claiming damages under State law for wrongful discharge and intentional infliction of emotional distress, and Federal law for violations of 45 U.S.C. §§ 52, 55 & 60. Those claims were dismissed by the district judge. *Mayon v. Southern Pacific Transportation Co.*, 632 F.Supp. 944 (E.D. Tex. 1986), *aff'd*, 805 F.2d 1250 (5th Cir. 1986).

2 45 U.S.C. § 153 First requires the National Railroad Adjustment Board to resolve these types of disputes, and provides both the administrative and appellate procedures for their resolution. Public Law Boards are established by agreement between the Railroad and the union pursuant to 45 U.S.C. § 153 Second. However, the administrative and procedural rules are the same as those applied to the National Railroad Adjustment Board, as are the standards of judicial review. *Brotherhood v. St. Louis Southwestern Railway Co.*, 676 F.2d 132 (5th Cir. 1982); *O'Neill v. Public Law Board*, 581 F.2d 692 (7th Cir. 1978); *Cole v. Erie Lackawanah Railway*, 541 F.2d 528 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).

> "We find that a reasonable and fair disposition of the lost earnings issue is to take cognizance, in some part, of the money judgment received by the claimant." R. 28.

Mayon then filed a petition to set aside the award of the Public Law Board pursuant to 45 U.S.C. § 153 First (q). The district judge, without explanation, duly entered an order vacating the award and ordered Mayon reinstated with full back pay. On Appeal, the Fifth Circuit Court of Appeals reversed the district court and reinstated the award of the Board, holding that the district court was unauthorized to second guess the arbiter.

SUMMARY OF THE ARGUMENT

The award made by the Public Law Board can be set aside only if:

1. The Board failed to comply with the requirements of the Railway Labor Act.
2. The award failed to confine itself to matters within the scope of the Board's jurisdiction.
3. There was fraud or corruption by a member of the Board.

45 U.S.C. § 153 First (q).

The Railway Labor Act, and its accompanying administrative proedures, mandates a form of compulsory arbitration for minor disputes in Railroad employment flowing from the collective bargaining agreement. Federal courts are barred from reviewing awards under the Act

except under very narrow circumstances. The twin issues of job reinstatement and back pay are classic minor disputes of this sort.

Because the district judge simply substituted his views for those of the Public Law Board, on the issue of back pay, this case was reversed and the award of the Board was reinstated.

———o———

ARGUMENT

The Railway Labor Act, 45 U.S.C. § 153, reflects a Congressional effort to bring about stable relationships between labor and management in the Railroad industry. *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30 (1957). The Act established an administrative scheme for the resolution of minor disputes arising out of the collective bargaining agreement centering around a group of Public Law Boards of professional arbitrators who would administer the Act and resolve these disputes. *See*, 45 U.S.C. § 153 First. Concomitantly, the Congress severely limited judicial review of the actions of the Public Law Boards, restricting such review to the specific grounds set out in 45 U.S.C. § 153 First (q). *Gunther v. San Diego v. Arizona Eastern Railway Co.*, 382 U.S. 257 (1965); *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railway Co.*, 373 U.S. 33 (1963).

As the Fifth Circuit stated in *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970):

> "The Federal Courts do not sit as super arbitration tribunals in suits brought to enforce awards of the Adjustment Board. They may not substitute their judgments for those of the Board divisions. They need not inquire whether substantial evidence supports the Board's awards. Under the Railway Labor Act . . . the range of judicial review . . . is among the narrowest known to the law. In court the findings and order of the Board are 'conclusive'." at 233.

And again in *Air Line Pilots Ass'n v. Eastern Airlines*, 632 F.2d 1321 (5th Cir. 1980) that Court said:

> "An award must be enforced, without judicial review of the evidence, if it draws its essence from the collective bargaining agreement, a recognition that national policy encourages the settlement of labor-management disputes by arbitration." at 1323.
>
> * * *
>
> "As long as the award is essentially drawn from the agreement, it is valid and effectively etched in stone." at 1324.

And finally, the 7th Circuit:

> "The district court (and this Court, on appeal from the district court) does not review the correctness of the arbitration award, even under a highly deferential standard, such as 'clearly erroneous' or 'clear abuse of discretion.' All it asks . . . is whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway Co.*, 768 F.2d 914, 921 (7th Cir. 1985).

Applying these principles to the case at hand, there is simply no justification for judicial interference with the action of the Public Law Board. The question of

whether Mayon was discharged without cause and should be reinstated with or without back pay is one calling for a resolution of the respective rights and obligations of employer and employee under the collective bargaining agreement—precisely the sort of dispute Congress had in mind when it enacted the Railway Labor Act.[3]

No contention is here made that a member of the Board was guilty of fraud, or that it failed to comply with the terms of the Act. R. 1-4. In essence, the sole ground relied on by Mayon is that in not awarding full back pay, the Board exceeded its jurisdiction.[4] R. 3. But the back pay question, even more than the issue of whether Mayon was wrongfully discharged in the first place, is well within the scope of the Board's powers, and many courts have so held. *Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959); *Zeviar v. Local No. 2747, Airline, Aerospace & Allied Employees*, 733 F.2d 556 (8th Cir. 1970); *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228

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[3] "The purposes of this Act are:

(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

45 U.S.C. § 151(a)

[4] Mayon asserts for the first time in his Petition for Writ of Certiorari, that the Board's action violates public policy. This additional point was not urged or briefed below and, therefore, is not properly presented for review. *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19 (1986); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6 (1983).

(5th Cir. 1970); *Pitts v. National Railroad Passenger Corp.*, 603 F.Supp. 1509 (N.D. Ill. 1985); *Spode v. Chesapeake & Ohio Railroad Co.*, 325 F.Supp. 1079 (D. Md. 1971).

The complaint here, of course, is that the Board acted irrationally in finding that Mayon was discharged without cause, and then refusing to award him full back pay. Even if this were so, the award cannot be disturbed. *Diamond v. Terminal Railway Alabama State Docks, supra.* Actually, the Board did rationalize its ruling, noting that Mayon had recovered $200,000 in damages in his FELA claim, and that claim was for earnings lost after October 7, 1983, the date of his discharge. R. 6-7. The Board thus reasoned that:

> ". . . we are not at liberty to disregard that a component of the $200,000 judgment that the Claimant received, pertained to lost earnings. We are not able to find that this lost earnings component was exclusively confined to lost earnings prior to October 7, 1983, and we conclude that this component also pertained to prospective lost earnings.
>
> We find that a reasonable and fair disposition of the lost earnings issue is to take cognizance, in some part, of the money judgment received by the Claimant." R. 28.

In short, the Board reasoned that since Mayon had already been compensated in part for the time he was wrongfully withheld from service, nothing in the collective bargaining agreement required that full back pay be awarded. This was clearly within the Board's power. *Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employers, supra.*

The Fifth Circuit has stated:

> "when an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Consideration of the FELA judgment by the Board in fashioning a remedy was an equitable method of resolving the issue. As the Fifth Circuit has stated:

> "we feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming permanent and total disability establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost. *Hodges v. Atlantic Coast Line Railroad Co.*, 363 F.2d 534, 539 (1966)."

The Board fashioned an equitable remedy to prevent such a double recovery.

Obviously, if the collective bargaining agreement prohibited the exercise of any discretion by the Board in fashioning the back pay award, it would be bound by it. *Air Line Pilots Ass'n v. Eastern Airlines, supra.* But where the question is whether reinstatement with full pay represents the sole remedy for an employee who has been discharged without sufficient cause, or whether the agree-

ment merely defines a range within which the Board can choose a remedy appropriate to the circumstances—one of which being the prior FELA recovery for future lost earnings—that choice is within the sole discretion of the Board. *Air Line Pilots Ass'n v. Eastern Airlines, supra; Lynchburg Foundry Co. v. United Steelworkers of America,* 404 F.2d 259 (4th Cir. 1968).

Here, there is no contention that the Board's decision was directly proscribed by the collective bargaining agreement. It therefore follows that the back pay award, emanating, as it did, from that agreement, is ". . . effectively etched in stone." *Air Line Pilots Ass'n v. Eastern Airlines, supra.*

CONCLUSION

Since the award of the Public Law Board in this case is not reviewable under any of the statutory grounds set out in 45 U.S.C. § 153 First (q), the trial court erred in setting it aside. The Fifth Circuit Court of Appeals was correct in refusing to allow the district court judge to substitute his opinion for that of the Board and its refusal should not be disturbed. There is not a conflict of decisions nor is there a meritorious issue worthy of review by this Court. The Petitioner's Petition for Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act [45 USCS §§ 151a, 152].

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organizations or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraph (b) and (c) of this section, respectively, within sixty days after the passage of this Act [enacted June 21, 1934], in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof [45 USCS §§ 151a, 152]

and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

> First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof [45 USCS §§ 151a, 152] and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division; Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the

division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employee, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner

up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral

referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on

the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On

such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code [28 USCS §§ 1254, 1291].

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act [enacted June 21, 1934] and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective

divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hear-

ings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.